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NTSB Order No. EA-3765

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of December, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10944
v.)	
)	
JOHN W. WANG,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued in this proceeding on September 7, 1990, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed in part an order of the Administrator suspending respondent's

¹An excerpt from the hearing transcript containing the initial decision is attached.

private pilot certificate on allegations that he violated sections 91.105(d)(1), 61.3(c), and 91.9 of the Federal Aviation Regulations (FAR), 14 CFR Parts 61 and 91.² The law judge did not affirm an allegation of a violation of FAR section 91.87(b),³ and reduced the sanction from 60 to 30 days.⁴

Respondent contends on appeal⁵ that the law judge erred in sustaining the violations of section 91.105(d)(1), and

²FAR §§ 91.105(d)(1), 61.3(c), and 91.9 provided in pertinent part at the time of the incident as follows:

"§ 91.105 Basic VFR weather minimums....

(d) Except as provided in § 91.107, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone-

(1) Unless ground visibility at that airport is at least 3 statute miles....

§ 61.3 Requirement for certificates, rating, and authorizations....

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under Part 67 of this chapter....

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³Failure to maintain two-way radio communications within an airport traffic area.

⁴The Administrator has not appealed these findings.

⁵Respondent's request for leave to file a brief responding to the points raised in the Administrator's brief, and to raise for the first time the issue of sanction, is denied, as he has failed to show good cause for the filing of further briefs. 49 CFR § 821.48(e).

residually, section 91.9.⁶ The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and order. For the reasons that follow, we deny respondent's appeal.

On the day in question, respondent departed the Nashua, New Hampshire airport under visual flight rules (VFR). His destination was Manchester Airport, which is less than 15 miles and no more than a 6-minute flight from Nashua. Respondent, who flies in the area regularly, was aware that the air traffic control tower at Manchester commenced operation at 6:00 a.m., and that the airspace above the airport then became a control zone.

Respondent met his passenger at 5:30 a.m., and they departed after pre-flighting the aircraft. Respondent is uncertain as to the time of their arrival into the Manchester area, but knows it was somewhat delayed because of a jet which he tried to stay clear of. As they approached Manchester, respondent made repeated radio transmissions, broadcasting his intention to land.

Respondent received no response, leading him to believe that it was still before 6 a.m. and that the tower had not yet opened. Unbeknownst to respondent, his radio was malfunctioning.⁷

Respondent and his passenger, who is a not-current pilot, both testified that their flight visibility was at times 10

⁶Respondent, a Senior Aviation Medical Examiner, does not contest the fact that he allowed his medical certificate to expire.

⁷The law judge made a specific credibility finding in favor of respondent's testimony that his radio malfunctioned. The law judge also found as a matter of fact that respondent entered the airport area a few minutes before 6 a.m.

statute miles, and always more than 3 statute miles. However, when respondent turned onto the base leg of the traffic pattern, he noted that ground fog obscured parts of the runway, and, because of this fog and in light of the fact that by this time he had realized his radio was malfunctioning, he decided that it was not prudent to land and he departed the area.⁸

The air traffic control specialist on duty and his supervisor both testified that at some point between 6:05 and 6:15 a.m. they observed a target on the radar screen, later identified as respondent's aircraft. The aircraft was in the traffic pattern, two or three miles within the airport traffic area, and within the control zone when it was first observed. Because of the weather, respondent's aircraft could not be seen from the control tower, but on the radar screen he appeared to be within a mile of the runway. Another aircraft was on an instrument approach to the airport at the same time. Air traffic control instructed that aircraft to break off his approach, because they were unable to get a radio response from respondent.⁹

The law judge found that respondent violated section 91.105(d)(1) because he should have left the traffic pattern of

⁸At 5:45 a.m., the surface weather operation for the Manchester Airport was "indefinite ceiling, 100 feet, sky obscure." Visibility was less than one-quarter mile on the ground. At 6 a.m., the Manchester Tower became operational and these surface weather conditions were reported over ATIS.

⁹Both controllers tried to reach respondent several times, on more than one radio frequency.

the airport as soon as he realized that the weather was below VFR minimums, which was when he was on the downwind. Respondent asserts on appeal that he should not be held to the standard contained in FAR section 91.105(d)(1), requiring ground visibility of at least 3 statute miles before landing an aircraft at an airport in a control zone. He argues that he was properly in the airport traffic pattern before the tower became operative, and that since he entered the area before it became a control zone, and since his radio malfunctioned, he could not have known the reported ground visibility after 6 a.m. and he should be excused for his error. We disagree.

First, we reject respondent's contention that because he entered the airport area before 6 a.m., his operation should be judged by the standard set forth in FAR section 91.105(d)(2), which requires only 1 statute mile of flight visibility when ground visibility is not reported. We have previously held that it is the availability of current reported ground visibility at the time the operation is initiated which is the controlling factor for a determination of the applicability of FAR section 91.105(d)(1). Administrator v. Harris, 5 NTSB 785, 786 (1985). Since section 91.105(d)(1) applies to aircraft which are taking off or landing, as well as to those entering the traffic pattern of an airport under VFR within a control zone, respondent's operation falls within that section's parameters because it included the initiation of a landing. A preponderance of the evidence establishes that respondent had already initiated a

landing when he was observed by air traffic control between 6:05 and 6:15 a.m, and that the ATIS was reporting the surface weather conditions by then. Therefore, the standard set forth in section 91.105(d)(1) controls and the undisputed¹⁰ evidence establishes that ground visibility at that time was insufficient under the regulation.

In Administrator v. Kokkonen, 4 NTSB 881 (1983) the Board held that a pilot is required to ascertain ground visibility before operating in a control zone. Respondent claims, nonetheless, that since he entered the area before it became a control zone he was not required to ascertain ground visibility before initiating a landing, because the VFR weather minimums did not apply as to his entire operation. This contention is meritless. He was not free to ignore VFR minimums required to enter the traffic pattern or land at an airport in a control zone merely because he entered that area moments before it became a control zone. Respondent knowingly entered an area which was about to become a control zone, and it was incumbent on him to find out what time it was before he reached the traffic pattern.

Moreover, his claim that he did not know he was in the control zone because his radio was malfunctioning must be rejected. Had he checked the time he would have known that the airport control zone was in effect. He would have then known that he was required to have ground visibility of at least 1 statute mile,

¹⁰ Respondent concedes that the weather was no longer appropriate for a VFR landing.

and, presumably he would have then known that he was required to leave the pattern immediately, on the downwind, rather than turning base and approaching final and causing another aircraft to abort its approach to land.

Finally, we reject respondent's argument that his actions do not support a residual finding of a violation of section 91.9. The fact that respondent operated VFR in a control zone when ground visibility was less than 1/4 mile in violation of section 91.105(d)(1) is more than sufficient to derivatively support that additional finding.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge's initial decision and the initial decision, are affirmed; and
3. The 30-day suspension of respondent's pilot certificate shall begin 30 days from the date of service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹¹For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).